CASE NO. **83-855**

UNITED STATES SUPREME COURT

Term

LOUIS EDWARD WHITE,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

Petition for Certiorari

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QUESTIONS PRESENTED

1. Where the Defendant, an English-speaking boat captain, contests the charges of transporting aliens from Haiti into the United States on the grounds that he did not know of their alien status and that he intended to surrender them to authorities and the only government witness who purportedly speaks both English and the Haitian language testifies that the defendant directed him in English to tell the other aliens in the Haitian language incriminating information and the only witnesses are the purported "translator" witness and the Haitians, whose only knowledge of purported communications from the Defendant come from the government's "translator" witness, and the only person that could contradict or impeach the government's "translator" witness, since he was the only other person on the boat who spoke English and was in a position to

hear all of the conversations between the Defendant and the "translator" government witness, was permitted to voluntarily depart the country prior to being interviewed by the Defendant, has the Defendant's Sixth Amendment rights to Compulsory Process and Fifth Amendment Due Process rights been violated?

2. Where under the circumstances outlined in question 1 the government did interview the absent witness but failed to allege or show that the government acted in good faith to determine whether the witness possessed exculpatory information for the Defendant, must the Defendant prove more than the absent witness's ability to communicate with him in english and his own testimony refuting the government witness's version of the conversations, thereby placing the burden on the government of proving its own good faith?

3. Where the government has established

an informal policy of not deporting aliens and has adequate facilities available to house these aliens must the government's action in permitting a potentially exculpatory defense witness to voluntary depart be presumed to be a bad faith action and the burden be on the government to show that this action was taken in good faith?

4. Where the government does not deport a witness but exercises its discretion to allow him to voluntarily depart prior to allowing counsel for the Defendant to interview him and the government fails to affirmatively show by affidavit, proffer or testimony assert their good faith belief that the witness lacked any exculpatory testimony, has the Defendant's Sixth Amendment right to Compulsory Process and Fifth Amendment Due Process rights been violated?

5. Where the government is the only

entity who has interviewed a witness, and then has allowed the witness to voluntarily depart the United States before he could be interviewed by the Defendant, can the government be permitted to stand mute and place the burden of making a "plausible showing" on the Defendant when the government possesses the only first-hand information concerning the witness and fails to allege good faith or lack of exculpatory evidence by the departed witness?

PARTIES

The only parties interested in this matter are the United States of America and the petitioner, Defendant below, Louis Edward White. United States Supreme Court Rule 21.1(b).

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JURISDICTION

This is a petition for a writ of certiorari from the denial of Petitioner's motion for rehearing and affirmance of his conviction by the United States Court of Appeals for the 11th Circuit.

On June 16th, 1982 the Defendant[1] was sentenced following his conviction of six counts of violation of 8 U.S.C § 1324 (a)(1)(1976). The Defendant timely filed his Notice of Appeal and on August 29, 1983 Defendant's case was affirmed on the non-argument calendar of the United States Court of Appeals for the 11th Circuit. On the 16th of September, 1983 the Defendant timely filed his petition for rehearing. This petition was denied on October 13th, 1983. Therefore, within the time provided by law, Defendant has

[1] Petitioner will be referred throughout this petition as the Defendant for consistency.

filed his petition for Writ of Certiorari.

The statutory provision which confers jurisdiction on this court is 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

UNITED STATES CONSTITUTION AMENDMENT 5 (v)

> Crimes: Double Jeopardy: self-incrimination: Due Process: Just Compensation for Property
>
> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, or in the militia when in public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION AMENDMENT 6

> Jury trial for Cimes and Procedural Rights
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and

public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

8 U.S.C. § 1324. Bringing in and harboring certain aliens--Persons liable.

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who--

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves or attempts to transport or more, within the United States by means of transportation or otherwise in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United

States of--

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: Provided, however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

STATEMENT OF THE CASE

On December 15, 1981 officers with the Florida Game and Fresh Water Fish Commission saw a white cabin cruiser moving northward through the Intracoastal Waterway approaching the Dania cut-off canal (T.20)[2] this sighting

[2] All citations to the Record are cited as R. and the page number. Citations to the Transcript at the District Court level are indicated as T. and the page number.

was at about 10:00 o'clock in the morning on an overcast but calm day (T.30). The Defendant was captaining the boat. On deck with him were two black males. The wildlife officers approached the vessel and saw that there were other black people in the cabin of the boat (T.21-22). The officers detained the vessel and called for the Florida Marine Patrol (T.23). The reason why the boat was stopped is unclear (T.23). The Defendant and his passengers were kept in the boat in the water for approximately five minutes (T.24) waiting for the Marine Patrol. The boat was then towed by the Marine Patrol (T.28) to a private dock. The vessel was malfunctioning and the Defendant advised the law enforcement officers that he had been experiencing engine trouble (T.28). The boat was loaded with scrap metal and other salvage materials (T.23).

At the dock each of the passengers aboard the boat was questioned by Immigration Inspector Grimm (T.136). Grimm, however, did not communicate directly with these eight individuals but used one of these suspected aliens as an interpreter (T.137). The inspector never disclosed who interpreted for him or gave any facts to support the accuracy of the translation. None of the people aboard Defendant's vessel gave the officer any immigration documents that morning.

Out of the eight passengers, one eventually escaped from the authorities and one, the "African" was allowed to voluntarily depart the country (T.9)[3]. All of the remaining passengers testified for the government at trial (T.32, 60, 80, 93, 106, 122).n

[3]. The defendant expressed uncertainty in his brief of appellate at the court of appeals as to whether or not the "African" was deported or allowed to voluntarily depart. See Appellant's brief page 5. Counsel on appeal for the defendant was not trial counsel and therefore was not aware of facts undisclosed in the

Following the close of the government's case, the Defendant testified in his own behalf (T.151, et. seq.). Defendant testified that after arriving in Fort Lauderdale, Florida, he saw that the Coast Guard station was crowded with a line of small boats, life rafts and a large Scandinavian ship all docked (T.153, 161). Because he had only one engine and steering was difficult he intended to dock at another marina (T.161) and "call the police." The government presented no rebuttal testimony (T.164).

(Continuation of N[3]) record; however, the government represented by trial counsel, Karen Adkinson, stated in brief appellee on page 8 states that the African, referred to throughout both appellee and appellates brief as the African also known as Simone Seikou, was granted voluntary departure. The court of appeals in its decision also apparently assumed that the African was allowed voluntary departure. Court of Appeals opinion page 3.

ARGUMENT

In United States v. Valenzuela-Bernal, 458 U.S. _____, 102 S.Ct.3440 (1982) [hereofinafter cited as Valenzuela-Bernal], a divided Court reversed a decision of the 9th Circuit Court of Appeals rejecting that court's "conceivable benefit test" where the government had deported a witness later alleged by the defendant to have been crucial to his case. In that decision, written by Justice Renquist, the Court found that the government had conflicting but equally powerful obligations of prosecuting persons in the position of defendants indicted for criminal offenses, and at the same time to deport persons involved in the same events in order to carry out the immigration policies that Congress had inacted. Id. at 3445.

In Valenzuela-Bernal, the respondent was charged with violations similar to those

brought against your petitioner. In that case, however, an assistant United States attorney interviewed all of the witnesses to the purported incident and concluded that the passengers possessed no evidence material to the prosecution or defense of respondent for transporting illegal aliens. After making that evaluation that Government deported two of the passengers to Mexico. Id at 3443. The Defendant claimed that the deportation deprived him of the opportunity to interview the two remaining passengers in order to determine whether they could assist in his defense. The defendant made no attempt to show that these passengers were in any way different from the other passengers who were retained to testify at trial.

In addition, in that case, the government agreed to stipulate that none of the passengers in the car told respondent that they were in the United States illegally. The respon-

dent would not agree to stipulate to those facts.

The Valenzuela-Bernal facts are distinguishable from the facts of the instant case. In this instance, although all individuals were purportedly interviewed by an immigration inspector, there was no allegation or showing by the government that any Assistant United States Attorney or other prosecutor had interviewed all of the witnesses. Moreover, the government made no attempt to show that they had acted in good faith in allowing one of the witnesses, one of only two who spoke the language also spoken by the Defendant, to voluntarily depart the country.

In addition, the government in this case was not executing its obligations under the immigration laws of this country to deport an individual, but rather permitted voluntary departure, not an executive mandate pursuant

to Congress or the law. The government in no way offered to stipulate what the possible testimony of this witness might be as the government had done in Valenzuela-Bernal.

In the majority opinion, the Court in Valenzuela-Bernal addressed the compelling, though competing, interests of the government in satisfying immigration policy of promptly deporting alien witnessess "who are determined by the government to possess no material evidence relevant to a criminal trial" Id. at 3445. and the enforcement of crimes. The court's decision therefore implies that the Defendant's burden of establishing the nature of and necessity for an absent witness's testimony mandated by Valenzuela-Bernal is applicable only where the government preliminarily establishs that; (1) The unavailability of the witness to defense counsel is based on justifiable and normal or routine immigration policy and; (2) that the government has made a

good faith determination that the witness possesses no material evidence relevant to the criminal trial.

In the instant case the witness was not deported, but rather was permitted to voluntarily depart. This departure is in no way an obligation or enforcement of immigration policy. The government failed to meet the initial criteria. Second, the government failed to make any statement or showing in this case that it had interviewed the witness and that the government by and through an Assistant United States Attorney or other responsible lawyer or prosecutor had made any determination concerning the witness's ability to testify and give material testimony for the government or the defendant.

This Court, in Valenzuela-Bernal, distinguished a case where the government concealed or failed to make a witness available

under ordinary circumstances (See Freeman v. State of Georgia, 599 F. 2d 65(5th Cir. 1979)) from instances, where the government by reason of its discharge of legal mandates and laws imposed on it by Congress had exercised those responsibilities. As the court stated,

> No onus in the sense of "hiding out" or "concealing" witnesses, attached to the government by reason of its discharge of the obligations imposed upon it by congress; its exercise of these manifold responsibilities is not to be judged by standards which might be appropriate if the government's only responsibilities were to prosecute criminal offenses.

In the instant case, where the witness was not deported, and the government therefore was not exercising its responsibilities under any act of Congress but rather was taking a discretionary step to permit the individual to voluntarily depart, the standards which must be placed on the government are substantially more stringent than those set forth in a case where the witness was deported.

In the instant case, there were numerous witnesses that the government did not deport or allow to voluntarily depart. The Defendant only speaks the English language. A key government witness, Wilson Pierre, claimed to have spoken both English and some creole, the Haitian langauge. It should be noted that Mr. Pierre's English was apparently so poor that the government chose to have him speak through a translator at trial. (T.32). Mr. Pierre testified that the "African," the individual who had been permitted to voluntarily depart the United States prior to being interviewed by defense counsel also spoke English (T.54-5) and that the "African" was in a position to hear all of the conversations which purportedly occurred between the Defendant and Wilson Pierre (T.48-9).

Therefore, the Defendant in the instant case seeks the resolution of issues left unresolved by the Court in Valenzuela-Bernal.

Specifically, in Valenzuela-Bernal, the Court held that an actual deportation of a witness would not necessarily establish a Fifth or Sixth Amendment violation where the executive branch made a good faith showing that the witness had no information favorable to the Defendant. In the instant case, the government did not deport the witness, but permitted him to depart, a use of its discretion. Moreover, the government failed to make any good faith determination as to whether or not the witness had any information exculpatory of the defendant. The government had numerous occasions during pretrial motions and during the trial of this case to allege the information available by the departed witness was not exculpatory yet the government made no such characterization to the court. Therefore, the government by standing mute placed the burden on the Defendant--this is intolerable and violates all precepts of our constitution. Here the Defendant did not have adequate

information to make any showing beyond that which he made, the Government's silence should not defeat this Defendant's Constitutional rights.

Several of the fears outlined in concurring and dissenting opinions in Valenzuela-Bernal were actualized in the instant case. As Justice O'Connor stated in her concurring opinion, citing Washington v. Texas, 388 U.S. 14, 19, 87 (S. Ct. 1920, 1923, (1967):

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecutor's to the jury so it may decide where the truth lies. Id.

As Justice O'Connor noted, the right to compulsory process is essential to a fair trial: A governmental policy of deliberately putting potential defense witnesses beyond the reach of compulsory process is not easily rec-

onciled with the spirit of the compulsory process clause. United States v. Valenzuela-Bernal, supra at 3451.

In the instant case, because the "African" was not deported but rather, in a discretionary fashion, the government decided to permit him to voluntarily depart, the government in effect deliberatly put this witness beyond the reach of compulsory process without making any showing of their good faith attempt to determine whether or not the witness was potentially exculpatory to the defendant. In the instant case the errors are even more egregious where at least seven other witnesses were all detained. This leads to the conclusion that the Government's motive was not to alleviate overcrowded jails or centers or only retain crucial witnesses--the Government let everyone remain for trial except the one witness that spoke Defendant's language and could contradict the key Government witness.

The Court, in Valenzuela-Bernal, related mainly to the immigration problem in California, an area which has tradionally experienced problems with aliens smuggled into the State from Mexico. The main reason for their entry into the United States is to seek financial advancement and better employment. In California apparently, a determination is frequently made to immediately deport the aliens by physically placing them over the border and back into the jurisdiction of their own country, Mexico.

The instant case arises from a completely different immigration problem in the South Florida area. This problem, through informal policy is not handled in a similar manner as that in California. In the South Florida area, the type of illegal aliens sought to be brought in this country are those coming from countries with oppressive or dictatorial gov-

ernments. Many of these hopeful immigrants have come from Cuba and more recently Haiti. They seek political asylum in our Nation. In their case, the government's policy is most frequently one of detention and possible resettlement within the United States. There is no immediate deportation policy since immediate deportation is normally impossible in these areas and not necessarily in the best interest of the citizens of the United States.

The government has admitted that it authorized voluntary departure for the "African". Defendant does not know and was not able to ascertain, at any time what country the "African" voluntarily departed to. Certainly, he was not merely placed across the border as he might have been in a California-Mexico entry situation. Arrangements would have had to be made either with his home nation of Africa or some other nation for his departure to have been effectuated. This must

have taken a substantial period of time for the government to arrange. During that period of time it would have been reasonable to permit counsel for the Defendant to have interviewed the witness.

As Justice O'Connor suggested in her concurring opinion in Valenzuela-Bernal;

> ... the deportable aliens who are potential witnesses should be detained for a very brief period [of time] to afford government and defense counsel the opportunity to interview them. If, within that period, the Defendant requests that certain aliens not be deported, a federal magistrate should hold a hearing...similar procedures in the Ninth Circuit have produced very little litigation.

In the instant case, the alien was detained, however the defendant was not permitted to interview him.

The way in which the government handled the "African" witness in the instant case supports the concerns and fears of Justices Brennan and Marshall. Those concerns set

forth in their dissent in Valenzuela-Bernal indicated that the "dilemma" (of the government between dual responsibilities of immigration and in the enforcement of criminal law) was a "pure figment of the court's imagination, reputiated by precedent and by common sense."

Here, the government did not exercise any mandate of Congress but rather utilized its discretion to make a witness unavailable to the defendant. Surely, this court cannot permit the government to make such decisions, without any assertion of good faith or reflection, and later compel the defendant to prove beyond that which he proved in the instant case.

The United States Court of Appeals for the 11th Circuit recognized that the Defendant's argument included allegations that: (1) The absent witness, being the only other wit-

ness who spoke the same language as the Defendant; and (2) the "African" was the only person availabe to directly contradict the key government witness, Wilson Pierre's tesitmony that the Defendant instructed him to have the other witnesses lie. The other witnesses at trial, all of whom only spoke the Haitian language, could not respond to Wilson Pierre's allegations. All of their knowledge and information either came from Wilson Pierre, or from other persons who spoke their language, not from this Defendant. The 11th Circuit misapplies Valenzuela-Bernal in that it assumes that the "African" could only verify the other passengers' statements. This clearly is contradicted both in the Defendant's brief and his testimony at trial which specifically contradicted the testimony of Wilson Pierre, the only person able to converse with the defendant other than the missing witness.

The 11th Circuit's assertion in its

opinion at page 5 that "The substance of the testimony, moreover, would have been merely cumulative. All of the witnesses testified that White instructed them to lie," is inaccurate. As the record shows, the Defendant refuted the claim that he instructed Wilson Pierre to tell the others to lie (T.37-8)

All of the other witnesses were not instructed directly by the Defendant, rather they may have been instructed by Wilson Pierre, the government witness. This is not to say that Pierre acted as an agent or translator for the Defendant. Pierre may have fabricated the story independently of the Defendant. If proved to have been Pierre's story and not the Defendant's the "African's" testimony may have negated the intent and knowledge element that was an essential element against the Defendant.

As Justice O'Connor feared in her con-

curring opinion, the standards set forth in Valenzuela-Bernal compelled the 11th Circuit to speculate in regard to what information was necessary to satisfy the requisite "plausible showing" of materiality. (11th Circuit Court of Appeals, opinion, page 5.) Speculation or conjecture has no place in the criminal law.

As the various district courts within this country struggle to apply the extremely broad concepts of United States v. Valenzuela-Bernal, the district courts are left in dilemmas and criminal defendants, such as the Defendant in the instant case, Louis Edward White, are convicted despite the fact that their Fifth and Sixth Amendment rights to Compulsory Process and Due Process have been abridged. Only by narrowing the standards and clarifying them can this court can resolve the conflict and make clear the manner in which

the Court's opinion in Valenzuela-Bernal should best be effectuated.

Respectfully submitted,

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APPENDIX

The following materials are attached hereto as part of this appendix:

1. Appendix A - Order of 11th Circuit Court of Appeals.
2. Appendix B - Order denying Defendant's Petition for Rehearing.
3. Appendix C - Judgment and sentence of conviction.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5751
Non Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOUIS EDWARD WHITE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 29, 1983)

Before HENDERSON, HATCHETT and CLARK,

Circuit Judges.

PER CURIAM:

(Signatures)

Louis Edward White appeals from his conviction on six counts of unlawfully transporting aliens into the United States in violation of 8 U.S.C. §1324(a)(1) (1976). Finding no error, we affirm.

On December 15, 1982, officials of the Florida Game and Fresh Water Fish Commission observed a cabin cruiser riding low in the water as it traveled northward in the intercoastal waterway. Approaching the vessel, the officers saw two black males on the deck with the appellant, who was at the helm. Numerous black passengers were visible in the cabin. The boat was detained for questioning by the Florida Marine Patrol and immigration inspectors. Wilson Pierre, one of the two English speaking passengers, translated White's instructions to everyone on board to tell the immigration officials that they had been rescued by White when he discovered them on a sinking ship coming from Haiti. In reality, the eight foreign passengers boarded White's

vessel in Bimini. They had no visas, passports or other documentation entitling them to lawful entry into the United States. Each paid him several hundred dollars for the trip. With Pierre apparently serving as a Creole translator, the aliens lied to the law enforcement officials, claiming they had been rescued. Later, Pierre told the truth and became the government's key witness in the prosecution of White.

White was indicted on eight counts of illegally transporting aliens into the United States. Seven of the illegal aliens were Haitians and one was African. Prior to White's trial, the African[1] was allowed voluntary departure[2] to his homeland, and the

[1] Both parties refer to this individual as "the African" rather than by his name, Simon Seykou.

[2] The appellant notes in his brief at 8 n.1 that there is some question whether the African was deported (Record at 8-9), or allowed to depart voluntarily from the United States (Record at 170). Under the circumstances of this case, the appellant asserts that the method or manner by which the African

left the country is not of controlling importance. Id., citing, United States v. Armijo-Martinez, 669 F.2d 1131 (6th Cir. 1982).

count in the indictment in which he was named was dismissed by the government. Another count was dismissed after one of the Haitians escaped from custody and was unavailable to testify. White was tried and convicted on the remaining six counts. He was ordered to serve concurrent sentences of one year and one day on each count, and to pay a fine of $500.00 on count one.

White first contends that his constitutional rights to due process and confrontation were violated when the government permitted the African to depart the United States before White's attorney could interview him to determine whether his testimony would be helpful to the defense. The United States Supreme Court recently addressed the identical constitutional argument in United States v. Valenzuela-Bernal, _____ U.S. _____, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982), where a defendant charged

with transporting illegal aliens claimed that the deportation of two passengers deprived him of his fifth and sixth amendment rights. The Court held that no constitutional deprivations are implicated unless the defendant makes "some plausible showing of how [the deported witnesses'] testimony would have been both material and favorable to his defense." Id., _____ U.S. at _____, 102 S.Ct. at 3446-47, 3449, 73L.Ed.2d at 1206. While acknowledging that it would be difficult to demonstrate materiality when there was no opportunity to interview the witness, the Court stated, "in such circumstances it is of course not possible to make an avowal of how a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality." Id., _____ U.S. at _____, 102 S.Ct. at 3448, 73 L.Ed.2d at 1205. Valenzuela-Bernal is entirely consistent with

the rule in this circuit that a defendant must offer a "plausible theory" of how the testimony of deported witnesses would be helpful to his defense. United States v. Avila Dominguez, 610 F.2d 1266, 1269-70 (5th Cir.), cert. denied sub nom Perez v. United States, 449, U.S. 887, 101 S.Ct. 242, 66 L.Ed.2d 113 (1980).[3]

White asserts that because none of the other passengers spoke English, only the absent witness could contradict Pierre's testimony concerning his conversations aboard the ship. However, the appellant does not suggest any novel or relevant information that would have been unique to the African's testimony. Rather, he merely claims that the missing witness could verify the other passengers' statements. If so, his testimony, like theirs, would have been unfavorable to the defendant.

[3] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

Moreover, he could not have first-hand knowledge of the conversations that the Haitians had with the officer because he did not speak Creole, the language of the Haitians. The substance of the African's testimony,moreover, would have been merely cumulative. All of the witnesses testified that White instructed them to lie. Consequently, they all recounted the same "sinking ship" tale to the law enforcement officers and later told the truth at the detention center. The trial transcript contains ample corroboration of these facts. White also refers vaguely to "exculpatory statements" made by the African. Record at 3, 10, 167, 169. This bare speculation does not satisfy the requisite "plausible showing" of materiality. The unavailability of this witness did not abridge White's fifth and sixth amendment rights. In view of the overwhelming evidence of the appellant's guilt and his failure to demonstrate that the African's testimony would be beneficial and not cumu-

correctly denied his motion to dismiss the indictment.

White next argues that the evidence was insufficient to prove that he knowingly and intentionally brought illegal aliens into the United States. Specifically, he charges that no "entry" within the meaning of 8 U.S.C. §1324(a)(1) (1976) was proved and that the government also failed to extablish that the passengers were aliens. The standard of review for sufficiency is whether "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Perez, 698 F 2d 547 (5th Cir. Unit B) (en banc), cert. granted, _____ U.S. _____, 103 S.Ct. 444, 74 L.Ed.2d 600 (1982). The evidence is viewed in the light most favorable to the government and we are bound by the credibility choices of the jury. United States v. Kopituk, 690 F.2d 1289, 1329 (11th Cir. 1982).

White urges that his boat never docked

nor landed, and thus, no entry was effectuated. To sustain a conviction under 8 U.S.C. §1324, it is not necessary for the government to prove the details of a physical entry into the United States. United States v. Zayas-Morales, 685 F.2d 1272, 1274 - 77 (11th Cir. 1982). However, the mere transportation of an alien to an immigration entry point so that the alien may apply for admission does not constitute an "entry." Id. at 1277. White's boat was detained in the Dania Cutoff Canal after it left the intercoastal waterway in Broward County, Florida. Record at 19 - 21. White admitted that he bypassed the Coast Guard station on the Fort Lauderdale Inlet, but claimed that his boat was partially disabled and it would have been difficult to navigate into the station. Record at 153, 161 - 162. He insisted that he intended to proceed to the next marina to report the aliens to the authorities.

Viewing the evidence in the light most

favorable to the government, it was reasonable for the jury to find that White bypassed the immigration entry station to escape detection and that he did not intend to notify the officials that he was transporting aliens. Furthermore, despite White's contention to the contrary, the fact that he brought illegal aliens into the United States in broad daylight and failed to conceal them below deck does not prove his innocent moties. Rather, it suggests a clumsy attempt to subterfuge or a gamble that the aliens would not be discovered. According to the testimony of the passengers, he fabricated the "rescue" story when in fact he transported them for a valuable consideration. The jury was justified in finding that he knowingly and intentionally transported aliens and attempted to avoid detection by the United States immigration authorities.

The claim that the government did not prove that his passengers were aliens "not

duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States ...," 8 U.S.C. §1324(a) (1976), is likewise without merit. White admitted at the trial that he knew the six passengers were Haitian. Record at 160. An immigration inspector testified that none of the passengers produced a passport, visa or other document necessary for entry into the United States. Record at 136 - 40. When detained, none of the six had been properly admitted by an immigration officer. All of them acknowledged that they were Haitian citizens and that they had no passports or visas. They had paid large sums of money for the trip. Thus, the evidence sufficiently supports the finding that the passengers were aliens.

White also challenges the court's instructions to the jury on the essential elements of the offense. The trial court has broad discretion in its wording of jury in-

structions, which will not be disturbed so long as the charge correctly states the substance of the law. United States v. Borders, 693 F.2d 1318 (11th Cir. 1982); United States v. L'Hoste, 609 F.2d 796, 805 (5th Cir. 1980). Moreover, White did not object to this portion of the charge.[4] Therefore, he must demonstrate plain error to overcome this procedural

[4] The appellant takes issue with the following instructions:

> Title 8, United States Code, Section 1324, provides in part that: Any person who brings into the United States an alien not duly admitted by an immigration officer, or not lawfully admitted to enter or reside in the United States, shall be guilty of an offense against the laws of the United States.
>
> In order to establish the offense of bringing an alien no lawfully entitled to enter or reside in the United States, there are three essential elements which the Government must prove beyond a reasonable doubt:
>
> First: That the Defendant knowingly and willfully brought into the United States an alien.
>
> Second: That this alien was not admitted into the United States by an immigration officer, nor was this alien entitled to enter and reside within the United States under any other law pertaining to immigration.

> Third: That the Defendant knew the alien was not lawfully admitted at the time of entry into the United States, nor entitled to enter and reside within the United States.
>
> To bring into the United States means to transport by any means of transportation. An alien is any person who is not a natural-born or naturalized citizen, or a national of the United States. The term 'national of the United States' includes not only a citizen, but also a person who, though not a citizen of the United States, owes permanent allegiance to the United States.
>
> If you should find beyond a reasonable doubt that the Defendant knew this, then you may find the Defendant guilty of the offense charged.
>
> On the other hand, if you do not find this beyond a reasonable doubt, then you must find the Defendant not guilty of the offense charged. You must make this determination for each Count that is charged in the indictment.

deficiency. Fed.R.Crim.P. 30, 52(b); United States v. Graves, 669 F.2d 964, 971 (5th Cir. 1982).[5] Reversal is warranted only if the error is "so obvious that failure to notice it would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings,' ... and result in 'a miscarriage of justice' ..." United States v. Berrojo,

628 F.2d 368, 370 (5th Cir. 1980) (citations omitted). See also, United States v. Hinds, 662 F.2d 362, 370 (5th Cir. 1981), cert. denied, 455 U.S. 1022, 102 S.Ct. 1720, 72 L.Ed.2d 140 (1982).

[5] White acknowledges that his assignment of error respecting the jury instructions must be reviewed according to the plain error standard because he did not object to the district court's jury instructions on the grounds now advanced on appeal. He objected only to the court's charge on inconsistent verdicts, Record at 173 - 74, whereas his complaint on appeal relates to the elements of the crime.

White complains that the court's definition of "bring into" eliminated from the jury's consideration any question of entry. "Entry" can be shown by an alien's presence in

the United States and freedom from official restraint. United States v. Kavazanjian, 623F.2d730, 736 (1st Cir. 1980). See also United States v. Hanna, 639 F.2d194 (5th Cir. Unit B 1981). The district court charged in this instance that "[t]o bring into the United States means to transport by any means of transportation." The jury was specifically instructed that it must find that White brought the passengers into the United States. In addition, the court defined "illegal aliens" and the mens rea necessary for the offense.

Overwhelming evidence supports a finding of entry, and consequently, the appellant has failed to show plain error. See United States v. Franklin, 586 F.2d 560 (5th Cir. 1978), cert. denied, sub nom Bonamo v. United States, 440 U.S.972, 99 S.Ct. 1536, 59L.Ed.2d 789 (1979) (consideration should be givwen to the intructions as a whole and the evidence introduced against the defendant to determine if

instructions are plain error).

Finally, the appellant asserts that the district court, in its instructions, assumed that the individuals named in the indictment were aliens. He refers in particular to a jury instruction in which the district court characterized the passengers in the two dismissed counts as "alien[s]." White also failed to object to this part of the charge. In alluding to the remaining six counts, the district court's instruction adequately covered the definition of alien. The court sufficiently distinguished the instructions on the two counts from those remaining for the jury's consideration. No aspect of the charge rises to the level of plain error.

Accordingly, the judgment of the district court is A F F I R M E D.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5751

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOUIS EDWARD WHITE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING

( )

Before HENDERSON, HATCHETT and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Judge Henderson
United States Circuit Judge

APPENDIX C

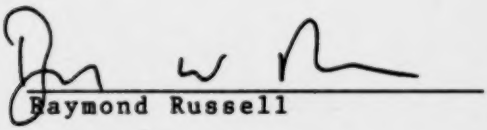
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for writ of certiorari was mailed this 22nd day of November, 1983 with adequate postage affixed to:

Stanley Marcus
United States Attorney
C/O Karen Atkinson
Assistant United States Attorney
155 South Miami Avenue
Miami, Florida 33130-1693

and

Solicitor General
Department of Justice
Washington, D.C. 20530



Raymond Russell